Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1789

ROBERT RUCKER,

Petitioner,

v.

GRIFFIN BELL, Attorney General of the United States; CYRUS R. VANCE, Secretary of State; LEONEL J. CASTILLO, Commissioner of Immigration and Naturalization Service; and DOMINICK RINALDI, District Director of the Immigration and Naturalization Service, Newark, New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated:
June 15, 1977

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert Rucker respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its affirmance of the judgment for the defendants entered by the United States District Court for the District of New Jersey in petitioner's action for a declaratory judgment that he is a citizen and national of the United States.

JUDGMENTS AND OPINIONS BELOW

The opinion and judgemnt of the Court of Appeals are set out as Appendix A and the opinion and judgment of the district court are set out as Appendix B. Neither of the opinions is officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory provision for retaining citizenship acquired at birth abroad to one citizen-parent and one alien parent - that of coming to the United States and residing here continuously for two years between the ages of 14 and 28 - is applicable to plaintiff notwithstanding his having had no knowledge of the requirement and, if so, does application of the "retention" requirement to plaintiff offend the due process clause of the Fifth Amendment?

2. Does the Citizenship Clause of the Fourteenth Amendment render Congress powerless to impose the "retention" requirement?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 301 of the Immigration and

Nationality Act of 1952, as amended, 66 Stat. 163 (1952) and 86 Stat. 1289 (1972); 8 U.S.C. § 1401, provides in relevant part as follows:

NATIONALS AND CITIZENS OF THE UNITED STATES AT BIRTH

Sec. 301. (a) The following shall be nationals and citizens of the United States at birth:

> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

"(b) Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) shall lose his nationality and citizenship unless - (1) he shall come to the United States and be continuously phy-

sically present therein for a period of not less than two years between the ages of fourteen years and twenty-eight years; or (2) the alien parent is naturalized while the child is under the age of eighteen years and the child begins to reside permanently in the United States while under the age of eighteen years. In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence."

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: Provided, however, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

"(d) Nothing contained in sub-

section (b), as amended, shall be construed to alter or affect the citizenship of any person who has come to the United States prior to the effective date of this subsection and who, whether before or after the effective date of this subsection, immediately following such coming complies or shall comply with the physical presence requirements for retention of citizenship specified in subsection (b) prior to its amendment and the repeal of section 16 of the Act of September 11, 1957."

The due process clause of the Fifth Amendment to the Constitution of the United States provides:

> "No person shall be ... deprived of life, liberty or property without due process of law."

The Citizenship Clause of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

STATEMENT OF THE CASE

The petitioner sought a declaratory judgment pursuant to 8 U.S.C. § 1503(a) that he is a citizen of the United States after the Immigration and Naturalization

Service had denied him a Certificate of Citizenship. In the de novo proceeding, the United States District Court for the District of New Jersey issued judgment for defendants. The Court of Appeals for the Third Circuit affirmed.

There is no dispute that Rucker was a citizen of the United States at birth, having been born abroad to a father who was a citizen by birth in the United States and to a non-citizen mother. At the time of his birth in Argentina in 1939, R. S. § 1993, as amended in 1934, 49 Stat. 797, provided that:

> "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States;".

The provision was carried forward in slightly modified form by amendments in 1940, the Nationality Act of 1940, § 201, 54 Stat. 1137, 1139; in 1952, the Immigration and Nationality Act, §301(a)(7), 66 Stat. 163; and in 1972, P.L. 92-584, 86 Stat. 1289, and is now codified at 8 U.S.C. § 1401(a)(7).

The 1934 Act and its successors also provided that where only one of the parents is a United States citizen, as here, the

child must reside in the United States for a number of years between specified ages in order to retain the citizenship acquired at birth. The 1934 Act required five years residence immediately previous to the eighteenth birthday but with each successive amendment the requirement was liberalized.[1] The present provision, which is retroactive, § 301(c), requires two years residence between the ages of 14 and 28. The plaintiff failed to meet the literal terms of even the most liberal version, having arrived in the United States in 1968 at the age of 29.

After a bench trial, the district court found that plaintiff "was subjectively unaware of the requirement until after arriving here" (20a). Plaintiff's father, Max Rucker, had left the United States for Argentina in 1936 and married an Argentine citizen in 1938. He learned of the "retention" requirement in 1941 when he registered Robert's 1939 birth with the United States Consulate in Buenos Aires. Nonetheless, he deliberately did not tell Robert of the provision but rather gave Robert the simple understanding that he was a United States citizen. Max always had the "desire to bring the whole family here" (20a); had registered both himself and Robert as United States citizens with the United States Consulate

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1/ The 1940 provision required five years residence between 13 and 21 and the 1952 provision required five years residence prior to attaining age 28.

in 1941, 1943, 1946, 1955 and 1957 (4 a) and had raised Robert so that he considered himself a United States citizen "because that was the way I was brought up at home, and we always talked about coming to the United States and staying here. It was not that we were living there permanently." (Tr. 39).[2] The district court credited Max Rucker's explanation for his silence:

> "[T]here were no funds for travel here before his [Robert's] 18th birthday, the mother had been sick, the intention had been to take the whole family, things didn't work out that way, and then it was too late to comply and there was no use of saying anything" (19 a).

Petitioner testified that if he had known of the retention requirement he would have insisted on coming to the United States within the specified time (Tr. 39), an assertion corroborated by Max Rucker's account of the confrontation between the two when Robert first learned of his father's deliberate concealment of

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2/ The Transcript ("Tr.") is part of the record before the Court of Appeals. If requested, petitioner will lodge copies of the record with the Court.

the provision. (19 a). Instead, Robert Rucker departed for the United States in 1968 at the age of 29, believing that he was a citizen and that only the "paper work" with "proof" of his citizenship need be obtained here (Tr. 101-103).[3] [4]

REASONS FOR GRANTING THE WRIT

1. In upholding the application of the "retention" provision in Rogers v. Bellei, 401 U.S. 815 (1971), the Court emphasized that there was "no claim of ignorance or of mistake or even of hardship," at 836, and that Bellei had been warned of the retention requirement on several occasions but had chosen not to comply with its terms. Here, a "claim of ignorance" has been credited but the "retention" requirement nonetheless applied

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3/ The district court somewhat loosely restated this testimony as being to the effect that Rucker "assumed he was a citizen and merely needed to come here to apply" (20 a).

4/ The Court of Appeals is incorrect in suggesting that Rucker is eligible for naturalization (11a). An alien must reside in the United States for five years "after being lawfully admitted for permanent residence" to qualify for naturalization. 8 U.S.C. § 1427. Rucker has never been admitted for "permanent residence" and has been able to stay in the United States only by virtue of the pendency of this litigation.

to divest Rucker of his United States citizenship. The Court should determine whether the statutory and constitutional analysis upon which it sustained the retention provision in Bellei permits this result for petitioner and all others who may be similarly situated. The importance of confirming or dispelling the clear implications of the Bellei opinion hardly needs emphasis given the Court's long and consistent history of carefully scrutinizing statutory provisions divesting persons of citizenship.

The issue is clearly substantial. In Bellei, the Court rejected the contention that the retention requirement was "unreasonable, arbitrary, or unlawful" under the due process clause of the Fifth Amendment. Id. at 831. It identified the animating concern of Congress in enacting the provision to be the fear that a dual national, born abroad to parents only one of whom is a citizen, may feel primary allegiance to his or her country of birth and found that it was reasonable for Congress not to maintain the dual national's United States citizenship in that event. Id. at 831-2. Related was Congress' desire to avoid possible diplomatic entanglements on behalf of persons whose primary allegiance is to another country. Id. at 832-3. The Court also found the Congressional method of determining allegiance to the United States to be appropriate. Residence has been historically perceived "as the talisman of dedicated

attachment," id. at 834, and, while only a demonstration of "dedicated attachment" to the United States and not a true election between United States and foreign citizenship is required, the provision is similar in character and derives historically from the solution frequently proffered in our history of imposing upon a dual national a "duty to elect." Id. at 833.

As indicated by the Court's several references to Bellei's having been warned of the retention provision, it is difficult to understand how the requirement can serve its talismanic function and operate on the principle of election if the citizen does not have knowledge of its provisions. Where there is no knowledge of the requirement, the failure to come to the United Stateswithin a specified period of time simply provides no indication of the citizen's attachment to the United States. As this Court has observed, "living abroad ... is no badge of lack of allegiance ... It may indeed be compelled by family, business or other legitimate reasons," Schneider v. Rusk, 377 U.S. 163, 169 (1964). Congress concurred in that view; the retention provision only requires a brief sojourn in the United States - a mere two years between ages fourteen and twenty-eight - and then complete freedom to live elsewhere for the rest of the citizen's life.

The Solicitor General's successful de-

fense of the statute in Bellei also was based upon a construction which in terms appears to require the citizen's knowledge of the requirement. The Solicitor General argued that "the requirement that a dual national born abroad must demonstrate his election of United States citizenship by residence inthis country is reasonable", Brief for the United States, p. 6, and did not create a second-class citizenship because it "merely requires that a person make one showing of his attachment to this country ....." Brief for the United States, pp. 20-21 (emphasis in original). He also contended that historically as well as analytically the provision is based upon the traditional concept of election for dual nationals and that residence was chosen merely as the form for the expression of that election. Brief for the United States, pp. 21-35. A full analysis of the legislative history only serves to emphasize the soundness of the Solicitor General's view.

If not construed to require the citizen's knowledge of its provisions, the retention requirement is open to serious constitutional challenge as "unreasonable," "irrational or arbitrary or unfair" under the due process clause. Rogers v. Bellei, supra, at 831. The statutory purpose is to distinguish those dual nationals who have an attachment to the United States from those who do not. Remaining abroad when one knows that the consequence is the loss of United States citizenship is some indication of allegiance, even though others

perhaps more appropriate can be imagined. Id. at 833. However, where there is no knowledge of the requirement for affirmative action "the means" are not "reasonably calculated to effect the end," Perez v. Brownell, 356 U.S. 44, 60 (1958). Similarly, the provision would offend the due process principle that "unwarranted conclusive presumptions" may not be used to divest persons of privileges, rights or benefits in which they have a substantial interest. See, for example, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S.441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Tot v. United States, 319 U.S.463 (1943). It is "neither necessarily nor universally true," Cleveland Board of Education v. LaFleur, supra at 644 that failure to begin residence in the United States at the stated age indicates a lack of attachment to the United States whether or not the citizen had knowledge of the requirement.

Perhaps moved by these considerations, two of the judges sitting on the courtbelow observed without deciding that "excuse or hardship" might avoid an unyielding, literal application of the statute (9a). However, the majority held that Rucker must lose his citizenship because of the district court's observation that "at no point along the line, particularly on the trip up via Peru, when he was fully grown, did [Rucker] undertake any rational inquiry," and that "the behavior indicates

that he was at least aware that there might be problems, and he felt it more prudent not to ask lest it prevent him from entering the U.S. altogether" (20 a). Judge Adams disagreed with his brethren's assessment of Rucker's behavior and of the record, observing that the disposition was an "unfortunate one", "especially so where, as here, such forfeiture stems from factors not wholly attributable to the person who has been stripped of his citizenship" (13 a). He nonetheless concurred in the affirmance, believing with the district court that the statute must be applied literally.

The majority failed to point to any circumstance which should have alerted Rucker to the fact that his father's representations were unreliable and there is absolutely no basis - let alone convincing evidence - in the record to support the majority's assertion that Rucker had any indication of "problems" at a time when he could have complied with the retention requirement. 5/ Moreover, the

5/ It was only when he went to the United States Consulate in Lima, Peru in 1968, when it was already too late to comply with the retention requirement, that Rucker was given reason to believe there might be difficulties (Tr. 32-33, 53-58). Neither unexpectedly nor unreasonably, plaintiff believed it better and preferred to seek a resolution of those problems while in the United States (Tr. 53-58), which he

(fn. cont'd. on next page)

notion that citizenship may be lost because a court finds the citizen was somehow negligent in protecting that citizenship is untenable. Congress did not rest the drastic remedy of loss of citizenship upon judicial consideration of something as subjective as negligence. It chose instead an objective test for which knowledge of the retention provision is essential. Nor did Congress intend to reserve citizenship only for the most vigilant and astute but sought to preserve it for all persons with an attachment to the United States.

5/ (Footnote 5 continued) entered on a tourist visa.

Characteristically, the majority also suggests without any foundation that Rucker was a sophisticated international businessman of substance who had "inclination to investigate and comply with the laws of nations." The implication, fateful to Rucker, is that he deliberately failed to make inquiries for fear of the answers. But, as Judge Adams observed, "Rucker appears to be little more than the operator of a local farming enterprise in Argentina, with minimal international dimensions at best" (13a).

The negligence standard adopted by the majority also flies in the face of the historic treatment of citizenship in our jurisprudence. Prior to holding that "voluntary renunciation" alone can expatriate a Fourteenth Amendment citizen, the Court noted that its "decisions upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country." Kennedy v. Mendoza-Martinez, 372 U.S.144, 214 (1963). See also Schneider v. Rusk, supra at 168.

Finally, loss of Rucker's citizenship because of his supposed negligence is singularly offensive to due process in the context of the United States Consulate's failure to inform Rucker of the retention requirement. The Consulate was required by Executive Order 8820, issued July 11, 1941, to provide for the registration of United States citizens. As stated in the State Department's 1960 Foreign Affairs Manual, Vol. 8, § 261.11a, one of the "advantages" meant to be afforded the United States citizen by registering is "to be informed, at the time of registration, of any changes in or new interpretations of the nationality laws which might affect his status." Max Rucker registered Robert with the Consulate as late as 1957, when Robert was 18. Nonetheless, the Consulate failed to inform Robert by mail or otherwise of the clearly applicable retention requirement. "Basic notions of fairness must preclude

the government from taking advantage of the consul's dereliction" in observing its own regulations. Corniel-Rodriquez v. INS, 532 F.2d 301, 302 (2d Cir. 1976).

2. In Bellei, a deeply divided Court held by a 5-4 vote that the Citizenship Clause of the Fourteenth Amendment does not apply to persons such as Rucker, who acquired citizenship pursuant to statute by birth abroad. The result is that Congress has the constitutional authority to impose tests of loyalty or other conditions for the retention of citizenship upon those persons even though it is powerless to do so for "Fourteenth Amendment" citizens.

For the reasons stated in the dissenting opinions in Bellei, the applicability vel non of the Citizenship Clause should be reconsidered. The paramount importance of citizenship in our constitutional scheme justifies this departure from the rule of stare decisis. See, for example, Afroyim v. Rusk, 387 U.S. 253 (1967).

CONCLUSIONS

For the foregoing reasons, the petition for a writ of certiorari should be

granted.

Respectfully submitted,

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Dated: New York, New York
June 15, 1977

APPENDIX A

OPINION AND JUDGMENT OF

THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1509

ROBERT RUCKER,
Appellant

v.

WILLIAM B. SAXBE, Attorney General of the United States; HENRY KISSINGER, Secretary of State; LEONARD F. CHAPMAN, JR., Commissioner of Immigration and Naturalization Service; DOMINICK RINALDI, District Director of Immigration and Naturalization Service, Newark, New Jersey

(D.C. Civil No. 1288-73)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued January 3, 1977

Before VAN DUSEN and ADAMS, *Circuit Judges*, and WEINER, *District Judge* *

Michael Krinsky, Esq., Rabinowitz, Boudin & Standard, New York, N.Y.;
Ira Gollobin, Esq., New York, N.Y.;
Attorneys for Appellant

Jonathan L. Goldstein, U.S. Attorney;
George E. Mittelholzer, Assistant U.S. Attorney;
Newark, New Jersey,
Attorneys for Appellees

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

(Filed March 17, 1977)

VAN DUSEN, *Circuit Judge.*

This is an appeal from a district court judgment entered in favor of the Government in a September 1973 action for declaration of citizenship brought pursuant to 8 U.S.C. § 1503. Plaintiff Rucker contests both the applicability and constitutionality of the provisions related to retention of citizenship (18 U.S.C. § 1401(b)) by persons born outside of the limits and jurisdiction of the United States to a parent citizen and a parent alien. Plaintiff urges that: the retention requirements should not apply, absent specific knowledge of them; such application would violate due process; and, in any event, the defendants are estopped from applying them to him for failure to inform his father, Max Rucker, of changes in the statute and for failure to inform plaintiff of the statute's existence. On the facts of this case, we hold that there is no constitutional infirmity to application of those requirements to plaintiff.

I.

Robert Rucker was born in Argentina on August 30, 1939. His mother was a citizen of Argentina; his father, Max Rucker, was a United States citizen by birth.

At the time of his birth, the plaintiff acquired United States citizenship under R.S. § 1993, as amended in 1934, 49 Stat. 797, formerly 8 U.S.C. § 6, which provided that one born abroad of a parent who was a United States citizen and a parent who was an alien was a United States citizen at birth and would retain citizenship if (1) he resided in the United States for five years immediately prior to his 18th birthday, and (2) he took an oath of allegiance within

six months after attaining age 21. We quote the statute in the margin.[1]

On January 17, 1941, Max Rucker registered the date and place of plaintiff's birth with the United States Embassy in Buenos Aires, which issued a Report of Birth. That document indicates that on or about January 12, 1941,

1. "Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Immigration and Naturalization Service."

Section 1993 was carried forward in slightly modified form by amendments in 1940, the Nationality Act of 1940, 54 Stat. 1137, 1139, 8 U.S.C. § 601; in 1952, the Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C. § 601; and in 1972, 86 Stat. 1289, P.L. 92-584, 8 U.S.C. § 1401.

Section 301 of the Immigration and Nationality Act of June 27, 1952 (8 U.S.C. § 1401), which was applicable from petitioner's 13th birthday until after he became 28, provides:

"(a) The following shall be nationals and citizens of the United States at birth:

"(1) a person born in the United States, and subject to the jurisdiction thereof;

. . .

"(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided* . . . .

"(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

"(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934 . . . ."

As noted below, Max Rucker received notice of the above 1952 Amendment to the residence requirement (8 U.S.C. § 1401) when he registered the May 29, 1962, birth of his daughter (petitioner's sister) with the consul at Buenos Aires in 1963.

BEST COPY AVAILABLE

Max Rucker became aware of the above residency requirements established by R.S. § 1993, as amended, which was quoted on the back of the Report of Birth. As is apparent, and as the parties stipulated, at all times material to this law suit, Max Rucker was aware of the existence of residency requirements, and aware of their applicability to his son, plaintiff Robert Rucker. Max Rucker registered himself and his son as citizens of the United States with the United States Embassy in 1941, 1943, 1946, 1955 and 1957. The 1955 registration form (Report of Birth, Child Born Abroad of American Parent or Parents), used to report the birth of Max Rucker's daughter Alice to the United States Embassy in Buenos Aires, was sent to Max Rucker on April 26, 1955, by mail. It contained notice of the 1952 amendments to the Immigration and Nationality Act, providing that divestiture of citizenship would occur if the individual whose birth was reported failed to "come to the United States and remain physically present therein for 5 years between the ages of 14 and 28."[2] In January 1962, Max Rucker registered himself alone. Robert Rucker was married in Argentina in May 1962 at the age of 22.

After applying for and obtaining a United States passport, Max Rucker left Argentina for the United States in 1964. His son remained there until 1968, when he came to the United States on a tourist visa issued in Lima, Peru, where he had been involved in a business venture. Plaintiff never made any inquiries to the United States Embassy in Buenos Aires, Argentina, the United States State De-

2. See Item 17 of Answers to Requests for Admissions, Document No. 21 in Civil No. 1288-73, D. N.J., filed February 27, 1975, which is the response to plaintiff's Request for Production of Documents, filed February 7, 1974, as Document No. 6 in Civil No. 1288-73, *supra*. The form was received by Max Rucker and executed in the presence of witnesses at Monte Carlo, Misiones, Argentina, on May 3, 1955. Its receipt by the United States Consul at Buenos Aires is evidenced by such Consul's signature on May 13, 1955, affirming, *inter alia*, that:

> "This report has been executed in triplicate, copy issued to parents, copy transmitted to Department of State, Washington, and copy placed under File No. 131 in the archives of this office."

This form also reported the birth of Robert Rucker as August 30, 1939, for the fourth time. See above this page.

partment, or any other agency of the United States Government concerning his rights to United States citizenship.

In May 1969, plaintiff applied for a Certificate of Citizenship with the Immigration and Naturalization Service, which was denied in May 1973, after an evidentiary hearing, on the ground that he had not complied with the retention requirements of 8 U.S.C. § 1401(b), or any of its predecessor statutes. In June 1973, the Assistant Commissioner for Naturalization affirmed the District Director's decision to deny plaintiff's application for a certificate of citizenship.

Plaintiff sought a declaratory judgment that he was a citizen from the district court, which found in favor of the Government. This appeal followed.

II.

In upholding the decision of the Immigration and Naturalization Service, the district court made specific findings. The judge was satisfied that Robert Rucker "was subjectively unaware of the [retention] requirement until after arriving here" and talking with his father, and that until that time "Rucker merely assumed he was a citizen and merely needed to come here to apply." The court noted that, judging from the Record of Birth filed with the Embassy in Argentina, Max Rucker was aware of the retention requirements from at least the time that the plaintiff was 1½ years old, and accepted the testimony that Max Rucker, when asked why he had not told his son of the retention requirements earlier, replied that there were no funds for travel to the United States before Robert's 18th birthday, that his mother had been sick, that the intention had been to take the whole family, and that when things did not work out it was already too late to comply with those provisions, and there was no purpose to saying anything. Also, the district court found that:

> ". . . at no point along the line, particularly on the trip up via Peru, when he [Robert Rucker] was full

grown, did he undertake any rational inquiry. He may have lacked specific knowledge but the behavior indicates that he was at least aware that there might be problems, and he felt it was more prudent not to ask lest it prevent him from entering the U. S. altogether."

The record shows that appellant lived in Argentina until he was 29 years old, is a citizen of Argentina, where he managed land, and has a wife, children, family business, and social contacts.[3]

III.

As to his first contention, plaintiff asserts that *Rogers v. Bellei*, 401 U.S. 815 (1971), is distinguishable because Bellei admitted awareness of the retention provision and consciously disregarded its requirements. At oral argument, plaintiff's counsel urged that lack of specific knowledge of the provision should prevent its application no matter at what age a person who acquired citizenship at birth might apply for declaration of this right. The crux of plaintiff's argument in this regard appears to be the notion that Congress, in enacting the original retention provision and its successors, was primarily concerned with the entanglements which might result from having citizens with dual nationality and dual allegiance. Bucker contends that since he has never acted in a manner inconsistent with allegiance to the United States, the policy underlying the state has not been thwarted, and the fact that he failed to meet the terms of the retention provision should be ignored.

Concededly, as plaintiff points out, "[l]iving abroad . . . is no badge of lack of allegiance . . . [and] may indeed be compelled by family, business, or other legitimate reasons." *Schneider v. Rusk*, 377 U.S. 163, 169 (1964). But just as we recognize the consistency of extended periods of

3. N.T. 31-32, 42-47, 62.

residence outside of the United States with continued loyalty and continued citizenship, the legitimacy of congressional regulation of the terms under which citizenship is offered in this context must also be respected.

IV.

The Supreme Court has held that the problems attendant upon dual nationality are an appropriate concern for Congress (*Savorgnan v. United States*, 338 U.S. 491, 500 (1950); *Rogers v. Bellei*, 401 U.S. at 831); that Congress has the power to withhold citizenship entirely from individuals born abroad of one alien parent and one citizen parent (*Rogers v. Bellei*, 401 U.S. at 831); and that Congress may impose conditions precedent and subsequent to the award of citizenship based upon statute, rather than upon the Fourteenth Amendment (*Rogers v. Bellei* at 834-35). The Supreme Court specifically stated in *Bellei*[4]

4. Bellei, like Robert Rucker, was born in 1939, so that the following language of the court in that case is particularly pertinent here:

". . . the plaintiff . . . would not be entitled to full citizenship because, although his mother met the condition for her residence in the United States, the plaintiff never did fulfill the residential condition imposed for him by any of the statutes.

"3. This is so even though the liberalizing 1940 and 1952 statutes, enacted after the plaintiff's birth, were applicable by their terms to one born abroad subsequent to May 24, 1934, the date of the 1934 Act, and were available to the plaintiff. See nn.5 and 1, *supra*.

"Thus, in summary, it may be said fairly that, for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child. For plaintiff Bellei the statute changed from complete disqualification to citizenship upon a condition subsequent, with that condition being expanded and made less onerous, and, after his birth, with the succeeding liberalizing provisions made applicable to him in replacement of the stricter statute in effect when he was born. The plaintiff nevertheless failed to satisfy any form of the condition.

V

. . .

"The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen. His posture contrasts with that of Mr. Afroyim, who was naturalized in the United States, and with that of Mrs. Schneider, whose citizenship was derivative by her presence here and by her mother's naturalization here.

that statutory citizenship is not an absolute, and that to hold otherwise would be to:

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4. (Cont'd.)

"The plaintiff's claim thus must center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitutional provisions other than the Fourteenth Amendment's first sentence.

"The reach of congressional power in this area is readily apparent:

"1. . . .

". . . the place of birth governs citizenship status except as modified by statute.

"2. . . . Art. I, § 8, cl. 4, vested Congress with the power to 'establish an uniform Rule of Naturalization.' . . .

"3. . . .

"Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was 'declaratory of existing rights, and affirmative of existing law,' so far as the qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned. *United States v. Wong Kim Ark*, 169 U.S., at 688. Then follows a most significant sentence:

'But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.'

"Thus, at long last, there emerged an express *constitutional* definition of citizenship. But it was one restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States. The definition obviously did not apply to any acquisition of citizenship by being born abroad of an American parent. That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.

"4. The Court has recognized the existence of this power. It has observed, 'No alien has the slightest right to naturalization unless all statutory requirements are complied with . . . .' *United States v. Ginsberg*, 243 U.S. 472, 475 (1917). See *United States v. Ness*, 245 U.S. 319 (1917); *Maney v. United States*, 276 U.S. 17 (1928). And the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent. . . .

"Further, it is conceded here both that Congress may withhold citizenship from persons like plaintiff Bellei and may prescribe a period of residence in the United States as a condition *precedent* without constitutional question.

"Thus we have the presence of congressional power in this area, its exercise, and the Court's specific recognition of that power and of its having been properly withheld or properly used in particular situations.

VI

"This takes us, then, to the issue of the constitutionality of the exercise of that congressional power when it is used to impose the condition subsequent that confronted plaintiff Bellei. We conclude that its imposition is not unreasonable, arbitrary, or unlawful, and that it withstands the present constitutional challenge."

401 U.S. at 826-31 (footnotes omitted).

". . . convert what is congressional generosity into something unanticipated and obviously undesired by the Congress. Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitutional requires so rigid a choice. If it does, the congressional response seems obvious." (at 835)

The plaintiff does not urge that residence, as a condition subsequent to descent of citizenship, offends the Constitution. Nor does it appear that plaintiff urges that the requirement that residence be completed before a certain age offends the Constitution. Rather, he asserts that as to himself the application of the latter requirement is unfair due to his lack of specific knowledge of the retention provision and its requirements. While we recognize that it is conceivable for unfairness to arise from the application of the retention provision, we are not convinced that plaintiff Bucker's situation presents the excuse or hardship which might justify an abrogation of the congressional prerogative in setting administratively manageable standards and rational nexus requirements upon the extension of citizenship to children born abroad to alien and citizen parents.

Plaintiff Bucker protests that he knew not of this statute—largely because his father kept this information from him—and that he assumed himself to be a citizen of the United States. We again refer to the district court finding that ". . . at no point along the line . . . when he [plain-

tiff] was full grown, did he undertake any rational inquiry" into his status, even though, as that court noted, his "behavior indicates that he was at least aware that there might be problems" regarding his United States citizenship, "and he felt it more prudent not to ask lest it prevent him from entering the U.S. altogether" (63a).

We note in this regard that the record indicates that plaintiff Rucker was, and is, a man of some independence and ability. After plaintiff's father departed from Argentina for the United States, Robert Rucker remained there for several years, charged with the maintenance and protection of family properties. Such responsibility is not generally entrusted to anyone incapable of attending to his own legal interests, and it further appears on the record that at the time plaintiff obtained a tourist visa for entry into the United States he was in Peru on business. The conduct of business of any sort, and particularly business with international relationships, suggests the capacity and inclination to investigate and comply with the laws of nations. Lastly, on this point, we observe that the statute did not by its terms or application demand action by a minor or incompetent. Rather, the required acts need only have occurred well after plaintiff's majority, whether that age be measured by the currrent voting age for federal elections (18), the traditional age of majority (21), or the age at which the plaintiff married (22).

On these facts, we find the apparent absence of specific knowledge of the retention provisions no bar to their application.

V.

The Third Circuit cases concerning inapplicability of restrictive time provisions in an action by a potential citizen, indicating that they could not be applied where the individual was unaware of a possible claim to citizenship, are distinguishable. In *Perri v. Dulles*, 206 F.2d 586 (1953), the plaintiff was "wholly unaware" of his claim to citizen-

ship (at 591). *Perri* involved rather extraordinary circumstances and the question of whether the plaintiff had voluntarily expatriated himself by voting in a foreign election and serving in a foreign army. In *Petition of Acchione*, 213 F.2d 845 (3d Cir. 1954), the court found that the petitioner "had no knowledge of her father's prior United States citizenship or of possibility on her part of a right to American citizenship" (at 845). In both cases this court found that claims of citizenship were timely pursued once the claimants became aware of the rights involved. There is no doubt, in this case, that plaintiff was aware at all times of his claim to American citizenship.

VI.

After careful consideration of plaintiff's other contentions—that application of the retention requirements to him, absent knowledge of their existence, violates due process, and that defendants are estopped from applying the retention requirements to plaintiff by reason of their failure to inform his father directly of the 1952 amendment to the statute and by reason of their failure to inform plaintiff of their existence—, we find them to be without merit.

As to the first, we note that plaintiff is not stateless. He has lived practically all his life in Argentina and first visited this country in 1968 at the age of 29. He asserts no claim of hardship and, presumably, is eligible to apply for naturalization.

As to the second contention noted above, we find no basis for the inference that there existed or exists an affirmative duty on the part of the Government to inform United States citizens resident abroad of changes in the nationality laws on a continuing basis, nor, in this case, is there indication of affirmative misconduct on the part of consular officials which, in an extreme situation, might warrant a finding of estoppel.

The change in plaintiff's position due to his alleged lack of knowledge of the law resulted not from any affirma-

tive action of the Government, but from the failure of his father to notify him of the necessity of his returning to the United States for five years between ages 14 and 28, even after receiving notice of the 1952 requirement in 8 U.S.C. § 1401 in 1955. See last paragraph of note 1.[5]

VII.

On the facts of this case, the application of the retention provision has not been shown to be in violation of the Constitution, and the judgment of the district court will be affirmed.

ADAMS, *Circuit Judge*, concurring:

While I concur in the affirmance of the judgment of the district court, I believe that it is appropriate to register the following comments.

In my view, the present appeal would appear to be controlled by Rogers v. Bellei.[1] That case concerned a challenge to the constitutionality of 8 U.S.C. § 1401 and of its application to an individual born abroad to parents, one of whom was an American citizen. The petitioner in *Rogers* had neglected to satisfy the requirements relating to the retention of citizenship. In sustaining the statute against his claims, the Supreme Court announced that Congress has rather plenary power with respect to matters concerning the citizenship of foreign-born individuals. In light of such a sweeping declaration, this Court seemingly has little choice but to uphold the ruling of the district judge that Rucker forfeited his citizenship because of his failure to comply with the retention provision.

5. The 1941 Report of Birth of Robert Rucker (Exhibit A to Stipulation at 29a-30a) notified Max Rucker of the five-year residence requirement then in effect.

1. 401 U.S. 815 (1971). See the discussion of *Rogers* in the opinion of the majority at 6-9.

At least as I see it, such a disposition may be an unfortunate one. For it is difficult to conceive of many harsher sanctions than the loss of an individual's birthright as a member of the American polity. This is especially so where, as here, such forfeiture stems from factors not wholly attributable to the person who has been stripped of his citizenship.

In this instance, it is evident that Rucker himself was unaware of the retention requirement, largely because his father neglected, for whatever reason, to inform him of it. Conceivably, such a situation could be a common one, since children in foreign lands may well be, in practical effect, dependent upon their parents if they are to learn of the statutory strictures in time sufficient to protect their citizenship.[2]

Moreover, the predicament in which Rucker finds himself may become more prevalent in the future. Today, in this era of ever-increasing transnational discourse, United States citizens are residing abroard in greater numbers—for example, as employees of multinational business enterprises or as emissaries—military and civilian—of the American government. It follows that the number of foreign-born children of American parentage promises to rise in the coming decades.

Given the unfortunate results which may obtain upon application of § 1401 in particular contexts, and the spectre of an increase in such cases because of current trends in international affairs, Congress may wish to consider the possibility of drafting a statute more flexible than the current retention provision appears to be. While § 1401 itself constitutes an improvement, in the "direction of leniency",[3] over its precursors, this does not mean that further ad-

2. At this point, it should be noted that the majority seems to suggest that Rucker is something of a transnational entrepreneur. Majority Opinion at 10. He is depicted as having engaged in a "business with international relationships." Nevertheless, as I read the record, Rucker appears to be little more than the operator of a local farming enterprise in Argentina, with minimal international dimensions at best.

3. Rogers v. Bellei, 401 U.S. 815, 826 (1971).

vances in dealing with the subject at hand have been foreclosed.

At this juncture, however, because of *Rogers* and the fact that Congress does have plenary power in the area in question, this Court may not countermand a determination within the province of the legislature. Accordingly, I join in the decision reached by my brethren.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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APPENDIX B

OPINION AND JUDGMENT OF

THE DISTRICT COURT

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 76-1509

Robert Rucker,
Appellant

vs.

WILLIAM B. SAXBE, Attorney General of the United States; HENRY KISSINGER, Secretary of State; LEONARD F. CHAPMAN, JR., Commissioner of Immigration and Naturalization Service; DOMINICK RINALDI, District Director of Immigration and Naturalization Service, Newark, New Jersey

(D. C. Civil Action No. 1288-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE --- DISTRICT OF NEW JERSEY

Present: VAN DUSEN and ADAMS, Circuit Judges and WEINER, District Judge*

JUDGMENT

This cause came on to be heard on the

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*Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

record from the United States District Court for the --- District of New Jersey and was argued by counsel on January 3, 1977.

On consideration whereof, it is now here ordered and adjuged by this Court that the judgment of the said District Court, filed January 26, 1976, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
Civil No. 1288-73

ROBERT RUCKER, Plaintiff,

vs.

WILLIAM B. SAXBE, et al., Defendants.

O P I N I O N

Rucker seeks a declaratory judgment that he is a citizen of the United States. On the basis of the evidence adduced at trial, the stipulation of the parties, and the applicable law, the court concludes that he is not.

Rucker was born in Argentina. His father was a U.S. citizen by birth here. His mother was a native and citizen of Argentina.

The statute at the time was R.S. §1993, as amended in 1934, formerly 8 U.S.C. §6. That law declared that the child of a U.S. citizen, born abroad, is a citizen of the U.S. It also provided that the rights of citizenship should not descend.

(a) unless the citizen parent

resided in the U.S. before the birth, and

(b) where one parent is an alien (as here) unless the child comes to the U.S. and resides here for 5 years continuously before age 18, and takes an oath of allegiance within 6 months after age 21.

Rucker's father registered the birth at the U.S. Embassy in Buenos Aires, and received a Report of Birth, an official form, with the full text of §1993 on the reverse side.

From time to time thereafter (though not always within the time limits) Rucker's father re-registered at the Embassy, the last being in 1962.

In due course, Rucker's father returned to the U.S., and later on Rucker followed. Rucker came on an Argentine passport, via a business trip to Lima, Peru and a tourist visa.

After arrival here, Rucker went to the Immigration Service in New York to get his citizenship papers, and was told he should have come to the U.S. long before and resided here, that "it was too late, that nothing could be done."

On returning to his father, he

questioned him about it and for the first time was shown the Report of Birth and read it, including the reverse side. He asked his father why he had not told him of the requirements before, that he might have managed to come to the U.S., and the father replied that there were no funds for travel here before his 18th birthday, the mother had been sick, the intention had been to take the whole family, things didn't work out that way, and then it was too late to comply and there was no use of saying anything.

In due course a formal application was filed and it was denied for failure to meet the retention requirements.

The statute spelling out the retention requirement was amended in 1941. (8 USC §601), again in 1952 (8 USC §1401 (b) and (c), and most recently in 1972 (8 USC § 1401 (b)).

There is no need to review the tenor of these changes, because Rucker did not comply with the requirements of any of them.

The court is satisfied from the testimony that Rucker's father was aware of the requirement at least from the time of the Record of Birth, when Rucker was 1 1/2 years old. It is also satisfied that with the passing years and the raising of personal obstacles to the

father's desire to bring the whole family here, the father was well aware that Rucker had probably lost his citizenship, but hoped against hope that some way could be found to salvage Rucker's status.

The court is also satisfied that Rucker himself was subjectively unaware of the requirement until after arriving here and after the talk with his father. It is further satisfied that Rucker merely assumed he was a citizen and merely needed to come here to apply. Yet at no point along the line, particularly on the trip up via Peru, when he was full grown, did he undertake any rational inquiry. He may have lacked specific knowledge but the behavior indicates that he was at least aware that there might be problems, and he felt it more prudent not to ask lest it prevent him from entering the U. S. altogether.

The law is settled by Rogers v. Bellai, 401 U.S. 815 (1970). Rucker is not a 14th Amendment citizen, as he was neither born or naturalized "in" the U.S. His claim to citizenship is based on the statute, and its requirements were not met.

Mr. Justice Black's dissent in Rogers fortifies this result. As he noted there, the initial language of the clause on citizenship in the 14th Amendment, as first proposed, applied to all persons "born in the United States or

naturalized by the laws thereof" (emphasis added), citing Cong. Globe, 39th Cong. 1st Sess. 2768. If that were the language, Rucker would have a basis for claiming 14th Amendment citizenship. Mr. Justice Black thought the final language, "naturalized in the United States" was another way of saying the same thing, but in the context of this case it clearly points the other way.

The court finds that the burden of proof specified by 8 U.S.C. §1481 (c) has been met and more. Rucker's claim of injustice, if any, is more properly directed against his father. Application of statutory law cannot be allowed to depend on subjective notions of those affected, particularly when they claim they were wholly unaware of the law.

Judgment will be entered in favor of defendants and against plaintiff. Each party will bear his own costs. Plaintiff's valiant effortto recapture a valuable status long lost through no personal fault ought not to be burdened further.

Defendant is to submit a form of final judgment, with a copy to plaintiff. Plaintiff will have 21 days after receipt within which to submit his views as to form, and the court will resolve any differences.

The foregoing opinion constituting the court's findings of fact and conclusions of law.

December 10, 1975

s/ Vincent P. Biunno,
U.S.D.J.

Original to Clerk
xc: All counsel

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1288-73

ROBERT RUCKER, :

Plaintiff, :

-v- : JUDGMENT

WILLIAM B. SAXBE, et al., :

Defendants. :

The within matter coming before this Court for trial; Craig Livingston, Esquire, appearing as counsel of record for the plaintiff; and Jonathan L. Goldstein, United States Attorney for the District of New Jersey, George E. Mittelholzer, Assistant U. S. Attorney appearing for the defendants; and it appearing that the trial of the within matter was conducted by this Court, sitting without a jury on January 14, 1975, the Honorable Vincent P. Biunno, United States District Judge presiding; and this Court having heard testimony and having considered the briefs and arguments of counsel; and it further appearing that this Court has made findings of fact and conclusions of law as set forth in its Opinion herein dated December 10, 1975; and good cause appearing; it is therefore this 22nd day of January, 1976,

ORDERED and ADJUDGED that Judgment be and hereby is entered in favor of the defendants and against the plaintiff, with each party bearing his own costs.

VINCENT P. BIUNNO, JUDGE
UNITED STATES DISTRICT COURT